GIBSON, DUNN & CRUTCHER LLP
LAWYERS
A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

333 South Grand Avenue, Los Angeles, California 90071-3197
(213) 229-7000
www.gibsondunn.com
TBouvet@gibsondunn.com

December 29, 2009

Direct Dial
(213) 229-7804
Fax No.
(213) 229-6804

Client Matter No.
36330-00001

The Honorable Vaughn R. Walker
Chief Judge of the United States District Court
for the Northern District of California
450 Golden Gate Ave.
San Francisco, California 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW

Dear Chief Judge Walker:

I write in response to Proponents' letter of December 28, 2009, opposing the public broadcast of the upcoming trial in this case. Plaintiffs strongly support televising the trial in order to afford the public meaningful access to the proceedings in this exceptionally important case.

It is well within this Court's authority to televise the trial proceedings. The Judicial Council of the Ninth Circuit has expressly authorized district courts to televise civil non-jury matters. *See* News Release, Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts (Dec. 17, 2009), *at* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf. In accordance with that authorization, this Court revised its Local Rule 77-3 on December 22, 2009, to provide that, "[u]nless allowed by a Judge or a Magistrate Judge . . . *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising . . . in connection with any judicial proceeding[ ] is prohibited." (Revisions italicized).

Proponents are therefore simply wrong when they assert that "Rule 77-3 flatly prohibits the broadcast or webcast of trial proceedings beyond the courthouse." Doc # 324 at 2. As amended, Rule 77-3 expressly affords district courts the discretion to televise proceedings when authorized to do so by the Judicial Council of the Ninth Circuit. Proponents are equally wrong when they contend that "video depiction of the trial proceedings in this case . . . would violate . . . this Court's General Order No. 58." *Id.* at 1. Although Proponents neglect to quote the

relevant language, General Order No. 58 explicitly authorizes this Court to deviate from the general prohibition on courtroom broadcasts imposed by that Order, which provides that, "*[e]xcept as may be otherwise ordered by a judge of this court*, . . . [p]hotographs may not be taken and images may not be captured by any means in the courthouse."

Moreover, while it is the position of the Judicial Conference of the United States that cameras should not be permitted in federal district courts, that policy is not binding on this Circuit or this Court. *See Armster v. United States Dist. Court*, 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) ("Except for judicial disciplinary proceedings, the Judicial Conference does not have binding or adjudicatory authority over the courts."). The nonbinding nature of the Judicial Conference's camera policy is confirmed by the fact that both the Southern District of New York and the Eastern District of New York have policies expressly authorizing judges to broadcast civil proceedings. *See* S.D.N.Y. Local Civ. R. 1.8; E.D.N.Y. Local Civ. R. 1.8.

Televising the bench trial proceedings in this case would also promote deeply rooted First Amendment principles that favor broad public access to judicial proceedings. *See Phoenix Newspapers v. United States Dist. Ct.*, 156 F.3d 940, 946 (9th Cir. 1998) ("One of the most enduring and exceptional aspects of the Anglo-American justice system is an open public trial."). Indeed, the Supreme Court has recognized that a "trial is a public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Because "it is difficult for [people] to accept what they are prohibited from observing," (*Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) (op. of Burger, C.J.)), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Broad public access to judicial proceedings also "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

In light of the overwhelming national public interest in the issues to be decided in this case, providing a broadcast of the proceedings is the most effective means of affording the public its constitutionally guaranteed right of access. More than 13 million Californians cast a vote for or against Prop. 8. And there are hundreds of thousands of gay and lesbian Californians who have a direct stake in the outcome of this case. Ultimately, however, the issues in this case are of such transcendent importance that *every* Californian should be afforded an opportunity to view the proceedings to the greatest extent practicable. Indeed, far from detracting from the right of public access (Doc # 324 at 6), the "highly contentious and politicized" character of the issues to be resolved in this case underscores the importance of providing the public with a meaningful window into the trial proceedings so it can see and hear what is happening in the courtroom. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed."). The "ability to see and to hear a proceeding as i[t] unfolds is a vital

component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004).

Proponents' concerns about "the possibility of compromised safety, witness intimidation, and/or harassment of trial participants" (Doc # 324 at 6) are utterly unsubstantiated and groundless speculation. Indeed, Proponents willingly thrust themselves into the public eye by sponsoring Prop. 8 and orchestrating an expensive, sophisticated, and highly public multimedia campaign to amend the California Constitution. They certainly did not exhibit a similar fear of public attention when attempting to garner votes for Prop. 8 from millions of California voters, when touting their successful campaign strategy in post-election magazine articles and public appearances (*see* Doc # 191-2; http://www.youtube.com/watch?v=ngbAPVVPD5k), or when voluntarily intervening in this case. In any event, many aspects of the trial—including opening and closing arguments and testimony by the parties' experts (who were designated *after* the Court first raised the possibility of televising the proceedings)—will not even remotely implicate Proponents' purported witness-related concerns. To the extent that this Court determines that witness issues or other factors militate against permitting camera coverage of particular portions of the trial, the Court possesses broad discretion to decide, on a case-by-case basis, whether certain portions of the proceedings should not be televised and can control the format and timing of all broadcast transmissions.

This case is an ideal candidate for the pilot camera project authorized by the Judicial Council of the Ninth Circuit. Plaintiffs stand ready to assist the Court in developing and implementing broadcast procedures, and the Media Coalition has indicated that it is willing to do the same. If this case—which raises constitutional issues of vital importance and overriding interest to millions of Californians and citizens across the Nation—is not appropriate for broadcast under the pilot project, it is difficult to conceive of any case that would be.

Thank you for considering our views on this important issue.

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
Counsel for Plaintiffs

cc: Counsel of Record